84-807

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NO. _____

BOEHRINGER MANNHEIM DIAGNOSTICS, INC.,
f/k/a HYCEL, INC.,
Plaintiff-Appellant

v.

PAN AMERICAN WORLD AIRWAYS, INC.,
Defendant-Appellee

On Appeal From The United States Court of Appeals For The Fifth Circuit

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JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether the district court, having found appellee liable under both the Warsaw Convention and the Texas law of negligence, properly awarded appellant attorney's fees as provided by Texas law.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	1
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT	2
THE QUESTION IS SUBSTANTIAL	3
CONCLUSION	9
APPENDIX A—Opinion of court of appeals	1a
APPENDIX B—Opinion and Judgment of district court	9a
APPENDIX C—Order of court of appeals denying petition for rehearing	36a
APPENDIX D—Notice of appeal to Supreme Court	38a
APPENDIX E—Full text of Warsaw Convention	41a
APPENDIX F—Article 2226 of Texas Revised Civil Statutes	62a

LIST OF AUTHORITIES

CASES	Page
Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975)	7
Benjamins v. British European Airways, 572 F.2d 913 (2nd Cir. 1978)	3
Block v. Compagnie Nationale Air France, 386 F.2d 323 (5th Cir. 1967)	4, 5
Domangue v. Eastern Airlines, Inc., 722 F.2d 256 (5th Cir. 1984)	9
Florida Lime and Avocado Growers v. Paul, 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963)	5
Huff v. Fidelity Union Life Ins. Co., 312 S.W.2d 493 (Tex. Sup. Ct. 1958)	8
In re: Mexico City Air Crash of October 31, 1979, 708 F.2d 400 (9th Cir. 1983)	3
Leroy v. Great Western United Corporation, 443 U.S. 173, 99 S.Ct. 2710, 61 L.Ed.2d 464 (1979)	2
Trans World Airline, Inc. v. Franklin Mint Corp., ____U.S. ____, 104 S.Ct. 1776, 80 L.Ed.2d 273 (1984)	3
UNITED STATES STATUTES	
28 U.S.C. § 1254(2)	2
49 U.S.C. § 1502 note	2
TEXAS REVISED CIVIL STATUTES	
Art. 2226	2, 3, 8
TEXTS	
12 Moore's Federal Practice ¶ 435.01[2]	2
MISCELLANEOUS	
Drion, *Limitation of Liabilities in International Air Law*, 114-115 (1954)	8
Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv.L.Rev. 497 (1967)	5, 6, 7

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the court of appeals (App. A, infra, 1a-8a) is reported at 737 F.2d 456. The opinion of the district court (App. B, infra, 9a-35a) is reported at 531 F.Supp. 344.

JURISDICTION

The judgment of the district court (App. B, infra, 34a-35a), awarding appellant Boehringer Mannheim Diag-

nostics, Inc., f/k/a Hycel, Inc. ("Hycel") attorney's fees of $15,000.00 under Tex. Civ. Stat. Ann. art. 2226, was entered on November 21, 1981. On July 18, 1984, the court of appeals entered judgment (App. A, infra, 1a-8a) reversing the district court's award of attorney's fees, holding that the Warsaw Convention preempted the Texas statute. On August 21, 1984, the court of appeals entered its order (App. C, infra, 36a-37a) denying Hycel's petition for rehearing on the attorney's fees question. On October 12, 1984, Hycel filed its notice of appeal to this Court (App. D, infra, 38a-40a) with the United States Court of Appeals, Fifth Circuit. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(2). *Leroy v. Great Western United Corporation,* 443 U.S. 173, 178-180, 99 S.Ct. 2710, 61 L.Ed.2d 464 (1979) (discussed in 12 Moore's Federal Practice ¶ 435.01[2] at 6-55).

STATUTORY PROVISIONS INVOLVED

The Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), reprinted at 49 U.S.C. § 1502 note, commonly referred to as the Warsaw Convention, is set out in full in the appendix (App. E, infra, 41a-61a).

Tex. Rev. Civ. Stat. Ann. art. 2226 is set out in full in the appendix (App. F, infra, 62a).

STATEMENT

Hycel sought recovery for damage to its freight under the Warsaw Convention, and also invoked diversity jurisdiction for a negligence action under Texas law. The

district court found appellee Pan American World Airways, Inc. ("Pan Am") liable under both claims and awarded damages under the Convention and also $15,000.00 in attorney's fees pursuant to Tex. Rev. Civ. Stat. Ann. art. 2226 (App. B, infra, 9a-35a). Pan Am appealed both awards, and the court of appeals, in addition to limiting the award of damages pursuant to this Court's decision in *Trans World Airline, Inc. v. Franklin Mint Corp.*, ____U.S.____, 104 S.Ct. 1776, 80 L.Ed.2d 273 (1984) (App. A, infra, 2a), reversed the award of attorney's fees, holding that "[t]he law of Texas, as relates to the cause of action, is preempted. Concomitantly, the law of Texas which provides for attorney's fees in claims lost or damaged freight is likewise preempted." App. A, infra, 7a).

THE QUESTION IS SUBSTANTIAL

To support its holding, the court of appeals first reasoned that the Warsaw Convention creates an exclusive cause of action (App. A, infra, 4a). The Second and Ninth Circuit cases relied on by the court of appeals (App. A, infra, 4a) do not so hold. *In re: Mexico City Air Crash of October 31, 1979,* 708 F.2d 400, 408-416 (9th Cir. 1983), and *Benjamins v. British European Airways,* 572 F.2d 913, 916-919 (2nd Cir. 1978), hold only that the Convention itself creates a universal cause of action for wrongful death independent of local law. Furthermore, the dissent in the Second Circuit case points out that the majority did not decide that the Convention cause of action was exclusive, and reasons that it is not: "State and Federal causes of action will co-exist and may be pleaded in the same case." 572 F.2d at 922, text at ftn.6 and ftn.6. Likewise, the Ninth Circuit, explaining

the "however founded" language of Article 24(1), states (708 F.2d at 414, ftn.25):

> The best explanation for the wording of article 24(1) appears to be that the delegates did not intend that the cause of action created by the Convention to be exclusive. For example, in the United States, state law causes of action may be invoked by plaintiffs injured during international air transportation. Such causes of action might, consistently with the Convention, provide varying measures of damages or varying specifications of persons entitled to recover. *Cf. In re: Aircrash in Bali,* 684 F.2d 1301, 1311 & n.8 (9th Cir. 1982) (any cause of action created by Warsaw Convention is not exclusive). The delegates used article 24(1) to ensure that neither the liability limits of the Convention nor its limitation period could be circumvented by resort to such an alternative legal basis of action. *See Riese* at 219-20; *Warsaw Minutes* at 213 (remarks of Sir Alfred Dennis).

Interestingly, the court of appeals' argument based on Article 24 of the Convention (App. A, infra, 5a) is, with immaterial variation, quoted from this same Ninth Circuit decision, 708 F.2d at 413, and, as the above quote from 708 F.2d at 414, ftn.25 shows, the Ninth Circuit read Article 24(1) and apparently the complete "remarks of Sir Alfred Dennis" at "Warsaw Minutes 213" to the opposite effect.

Otherwise, although agreeing with the district court (App. B, infra, 28a) that "[t]he Convention has not expressly preempted state law" (App. A, infra, 7a), the court of appeals based its holding solely on its observation that "[a]n obvious major purpose of the Warsaw Convention was to secure uniformity of liability for air carriers. *Block v. Compagnie Nationale Air France,* 386

F.2d 323 (5th Cir. 1967)" (App. A, infra, 7a). But that decision states only (386 F.2d at 327):

> The Conference achieved its two primary objectives: (1) uniform rules relating to air transportation documents (passenger ticket, baggage check, and air waybill); (2) limitation of the carrier's liability for an airplane accident.

Likewise, the Convention preamble focuses on uniform regulation of the conditions of liability, rather than on total definition of the liability (App. E, infra, 42a):

> Having recognized the advantage of regulating in a uniform manner the conditions of international transportation by air in respect of the documents used for such transportation and of the liability of the carrier.

See also Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention,* 80 Harv.L.Rev. 497, 498-499 (1967). The regulatory scheme of the Convention "in respect of the liability of the carrier," on the one hand, creates several universal but non-exclusive causes of action (Arts. 17-21), and on the other, specifies various conditions and limits (Arts. 22-30, 3(2), 4(4), 9) to which "any action for damages, however founded," is subject (Art. 24). The Convention's regulatory scheme neither intrinsically "permits no other conclusion," nor "unmistakably ordains," *Florida Lime and Avocado Growers v. Paul,* 373 U.S. 132, 142, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963), that local law may not apply where it does not conflict with the Convention's express conditions and limits.

Most significantly, the court of appeals ignores the district court's reference to the extrinsic evidence: "More-

over, it is clear that other nations party to this Treaty do not consider it to preempt awards of attorney's fees. *See* Lowenfeld & Mendelsohn at 507-09 . . ." (App. B, infra, 28a). More specifically, in September, 1955, at the time of the Hague Conference, the prevailing practice in the Convention signatory countries was to award attorney's fees to the prevailing party:

> Whenever a case went to trial and judgment, legal fees were awarded as a matter of course. In some countries, such as Germany, fees were awarded with fixed schedules [footnote excluded]; in others, such as England, they were awarded without benefit of a schedule [footnote excluded]. But in either event the losing party paid for the costs of litigation, including the fees of the prevailing party's lawyer. No one outside the United States had previously thought that the Warsaw Convention prevented a charge on the defendant for the plaintiff's costs.

Lowenfeld & Mendelsohn, *supra,* at 508.

Moreover, following unsuccessful attempts formally to amend the Convention to limit the practice of awarding attorney's fees under local law, *see* Lowenfeld & Mendelsohn, *supra,* at 508-509, 561-563, 567-568, 575, in 1966 by special contract under Article 22(1) all airlines servicing the United States voluntarily raised the liability limit (for personal injury) to $75,000, inclusive of legal fees and costs.

> except that in the case of a claim brought in a State where provision is made for separate award of Legal Fees and Costs, the limit shall be the sum of Fifty-Eight Thousand United States Dollars exclusive of Legal Fees and Costs.

Lowenfeld & Mendelsohn, *supra,* at 595-599 (quote is from a typical "Advice to International Passengers on Limitation of Liability" at 598). Since the Warsaw Convention does not, in any aspect relevant here, distinguish claims for personal injury and those for lost or damaged freight, these carriers, including Pan Am, by expressly providing a lower damage limit for claims in jurisdictions where provision is made for separate award of attorney's fees, tacitly acknowledge that the Convention does not preempt such local laws providing for attorney's fees.

Finally, Texas has clearly manifested its interest in assisting successful plaintiffs in freight damage cases by providing for recovery of attorney's fees, and this Court has indicted the respect due such a substantial policy of a State by a Federal court sitting in diversity. *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 259 n.31, 95 S.Ct. 1612, 1622, 44 L.Ed.2d 141 (1975).

Hycel recognizes that since its damages exceed the limitation amount, it can recover attorney's fees only if the Article 22(2) limitation does not apply to attorney's fees. The district court raised, but was not faced with decision on, this issue (App. B, infra, 28a, ftn.53), and it was not raised in the court of appeals. Hycel will address it briefly.

Hycel expects that Pan Am will not disagree that Pan Am took the position in the district court that attorney's fees are not "damages" under the Convention. (Pan Am's counsel may find this at R. 239).

The phrase "liability of the carrier" is used without direct definition in Article 22(1), (2), and (3) (App. E, infra, 53a-54a). However, Article 22(1) provides:

> (1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

Since the 125,000 franc limit clearly applies only to "damages" where local provision is made for periodic paymen thereof, a consistent reading of the provision dictates that the limit apply only to "damages" generally. Again, there is no reason to read "liability of the carrier" in Article 22(2) differently.

"It is believed that legal expenses awarded by a court against a carrier who loses a lawsuit, are no part of the damages limited by the limitation provisions of the Conventions. They are not damages arising from the conduct or the fact for which liability is imposed by the Conventions but expenses caused by the lawsuit itself . . ." Drion, *Limitation of Liabilities in International Air Law*, 114-115 (1954).

Attorney's fees awarded under Tex. Civ. Stat. Ann. art. 2226 are not "damages" under Texas law. *Huff v. Fidelity Union Life Ins. Co.*, 312 S.W.2d 493, 501 (Tex. Sup. Ct. 1958).

The Texas legislature has decided that in certain cases including claims for lost or damaged freight, where the responsible party refuses to tender the just amount owing with.: 30 days of demand, the claimant may recover reasonable attorney's fees (App. F, infra, 62a). The prob-

lem the Texas legislature sought to address is leveraging against the just amount owing by leaving recourse to an attorney and even litigation as the claimant's only alternative. *Cf. Domangue v. Eastern Airlines, Inc.*, 722 F.2d 256, 264 (5th Cir. 1984). Where, as here, Hycel's actual damage already exceeds the Convention limitation amount (App. A, infra, 3a-4a), the Texas policy against this practice is frustrated by inclusion of such fees in that limitation amount as well as it would be by preemption. And where, as here, Pan Am is already favored by the Article 22(2) limitation, and the Convention by reasonable construction so permits, the clear Texas policy should be honored.

CONCLUSION

Probable jurisdiction should be noted.

Dated: Houston, Texas

November _____, 1984

Respectfully submitted,

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APPENDIX A

BOEHRINGER-MANNHEIM DIAGNOSTICS, INC., f/k/a Hycel, Inc.,
Plaintiff-Appellee,

v.

PAN AMERICAN WORLD AIRWAYS, INC., Defendant-Appellant.

No. 81-2519.

United States Court of Appeals,
Fifth Circuit.

July 18, 1984.

Shipper brought action against air carrier under Warsaw Convention to recover for damaged cargo. The United States District Court for the Southern District of Texas, 531 F.Supp. 344, Walter Ely, Senior Circuit Judge, sitting by designation, entered judgment in favor of shipper, and air carrier appealed. The Court of Appeals, Politz, Circuit Judge, held that: (1) district court erred in concluding that air carrier's liability limit for loss of cargo under Warsaw Convention was to be determined by reference to free market price of gold; (2) under article of Warsaw Convention governing a carrier's liability limit for loss of cargo, although shipper proved damages totaling $34,-054.64 for cargo with total weight of 1,860 pounds, maximum recovery under the Convention and tariff restrictions was $16,870.20, where "official" price of gold at time of the loss was $42.22 per ounce, and carrier properly claimed liability limit of $9.07 per pound; (3) War-

saw Convention created cause of action for and was exclusive remedy against international air carrier for loss of or damage to cargo; (4) Warsaw Convention preempted Texas law which provides for attorney fees in claims for lost or damaged freight; (5) record did not support award of attorney fees under American rule; and (6) trial court properly awarded prejudgment interest.

Reversed and remanded.

Appeal from the United States District Court for the Southern District of Texas.

Before TUTTLE,* POLITZ and GARWOOD, Circuit Judges.

POLITZ, Circuit Judge:

We deferred resolution of this case pending the Supreme Court's decision in *Trans World Airline, Inc. v. Franklin Mint Corp.*, ____U.S.____, 104 S.Ct. 1776, 80 L.Ed.2d 273 (1984). That decision disposes of the principal issue before us, the value of gold for purposes of the cargo liability limit of the "Warsaw Convention."[1] In *Franklin Mint* the Supreme Court concluded that the Convention's cargo liability limit was not rendered unenforceable in the United States by virtue of the 1978 repeal of the Par Value Modification Act. The Court determined that the limitation of $9.07 per pound, CAB Order 74-1-16, 14 C.F.R. § 221.176 (1979)[2] was still in effect.

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* TUTTLE, Circuit Judge, sitting by designation.

1. Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), reprinted at 49 U.S.C. § 1502 note.

2. Restated in CAB Order 78-8-10, 43 Fed. Reg. 35971, 35972 (1978).

[1] The facts are succinctly stated in the district court's opinion, *Boehringer-Mannheim Diagnostics, Inc. v. Pan American World Airways,* 531 F.Supp. 344 (S.D. Tex. 1981). The district court erred in concluding that the air carrier's liability limit under Article 22 of the Convention[3] was to be determined by reference to the free market price of gold. The Supreme Court, in its intervening decision, teaches otherwise.

[2] The "official" price of gold at the time of the 1978 loss at issue was $42.22 per ounce. The liability limit of $9.07 per pound was properly claimed by Pan American Airways. Boehringer-Mannheim proved damages totaling $34,054.64. However, because the total weight of the

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3. The Convention was drafted at international conferences in Paris in 1925, and in Warsaw in 1929. The United States became a signatory in 1934. More than 120 nations now adhere to it. The Convention creates internationally uniform rules governing the air carriage of passengers, baggage, and cargo. Under Article 18 carriers are presumptively liable for the loss of cargo. Article 22 sets a limit on carrier liability:

> "(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. . . .
>
> "(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures." Article 22, reprinted (in English translation) at 49 U.S.C. § 1502 note.

In the United States the task of converting the Convention's liability limit into "any national currency" falls within rule-making authority which was, for many years including those at issue here, delegated to the CAB under the Federal Aviation Act of 1958 (FAA), 49 U.S.C. § 1301 *et seq.* International air carriers were required to file tariffs with the CAB specifying "in terms of lawful money of the United States" the rates and conditions of their services, including the cargo liability limit that they claimed.

cargo was 1,860 pounds, the maximum recovery under the Convention and tariff restrictions is $16,870.20. The judgment of the district court is reversed and judgment for $16,870.20 is to be rendered.

We are also asked to determine the correctness of the lower court's award of attorneys' fees under Tex. Rev. Civ. Stat. Ann. art. 2226. Boehringer-Mannheim sought recovery under the Convention and also invoked diversity jurisdiction for a negligence action under Texas law. The trial court found liability under both claims and awarded attorneys' fees as provided by Texas law.

[3] The essential inquiry is whether the Convention provides the exclusive liability remedy for international air carriers by providing an independent cause of action, thereby preempting state law, or whether it merely limits the amount of recovery for a cause of action otherwise provided by state or federal law. We have not previously addressed this question. We hold today that the Warsaw Convention creates the cause of action and is the exclusive remedy. Our colleagues of the Second and Ninth Circuits previously have so concluded, *Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978); *In re Mexico City Air Crash of October 31, 1979*, 708 F.2d 400 (9th Cir. 1983), reversing positions they had earlier taken.

The Warsaw Convention, as an accepted treaty, is binding. *Dalton V. Delta Airlines, Inc.*, 570 F.2d 1244 (5th Cir. 1978). We must determine its meaning under previously announced rubrics:

> [I]n construing [a] treaty, as other contracts, we give consideration to the intent of the parties so as to carry out their manifest purpose. . . . We proceed also under the admonition that where a treaty admits

> of two constructions, one restrictive of and the other favorable to the rights claimed under it, the latter is to be preferred.

Board of Com'rs v. Aerolineas Peruanasa, S.A., 307 F.2d 802, 806-07 (5th Cir. 1962). In examining the minutes and documents from the meetings resulting in the Convention, we find the delegates were concerned with creating a uniform law to govern air crashes, dehors national law save for questions of standing, the effects of contributory negligence and procedural matters. *See* Convention Articles 21, 24(2) and 28(2).

The Convention delegates voiced concerns about the possibility of major air crash cases being decided by courts of nations whose legal systems trailed developments in many or most other nations. To avoid the "prospect of a junglelike chaos," *Reed v. Wiser*, 555 F.2d 1079, 1092 (2d Cir. 1977), the Convention set forth rules for universal application. "While it is not literally inconsistent with this universal applicability to insist that a would-be plaintiff first find an appropriate cause of action in the domestic law of a signatory authorized by Article 28 to hear his claim, it is inconsistent with its spirit." *Benjamins* at 917-18.

Article 24 of the Convention is frequently cited in the debate whether the Convention created a cause of action. It provides:

> (1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.
>
> (2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply.

> without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

One delegate considered this provision to be "the very substance of the Convention, because it excludes recourse to common law" for a cause of action against the carrier. *Minutes of the Second International Conference on Private Aeronautical Law, October 1929, Warsaw* 213 (R. Horner & D. Legrez trans. 1975) (statement of British delegate Sir Alfred Dennis).

Finally the language of the treaty itself makes an affirmative statement of liability which we interpret as creating an independent cause of action:

> Article 18.
>
> (1) Le transporteur est responsable du dommage survenu en cas de destruction, perte ou avarie de bagages enregistres ou de marchandises lorsque l'événement qui a cause le dommage s'est produit pendant le transport aérien.

49 United States Statutes at Large 3000, 3005 (1934).[4]

[4-7] Having concluded that the Warsaw Convention creates the controlling cause of action, we further conclude that it preempts state law in the areas covered. The

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4. In interpreting the terms employed in the Convention, the French legal meaning governs. *Block v. Compagnie Nationale Air France*, 386 F.2d 323 (5th Cir. 1967).

The official translation declares:

> Article 18
>
> (1) The carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air.

49 United States Statutes at Large 3000, 3019 (1934).

Constitution provides that "all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land." U.S. Const. art. VI cl. 2. Any state law in conflict with a treaty is invalid. *See Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 98 S.Ct. 988, 55 L.Ed.2d 179 (1978). In addition, a state law must yield if the Congress preempts the field. Congress may preempt by expressing its intent to supplant state law or it may regulate a subject so pervasively that it completely occupies the field. The Convention has not expressly preempted state law. We must therefore examine the pervasiveness of the regulation for de facto preemption.

[8-10] The test for non-express preemption is whether: (1) the area requires national uniformity, *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963), (2) there is evidence of congressional design to preempt the field, *Jones v. Rath Packing Co.*, 430 U.S. 519, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977), or (3) the state statute actually and directly conflicts with the federal provision. An obvious major purpose of the Warsaw Convention was to secure uniformity of liability for air carriers. *Block v. Compagnie Nationale Air France*, 386 F.2d 323 (5th Cir. 1967). That uniformity has both an international and intranational application. The law of Texas, as relates to the cause of action, is preempted. Concomitantly, the law of Texas which provides for attorneys' fees in claims for lost or damaged freight is likewise preempted. There is no basis for applying Tex. Rev. Civ. Stat. Ann. art. 2226.

[11] Having ruled out the allowance of attorneys' fees under Texas law, we consider whether those fees are allowable under federal law. We conclude that they are not.

In *Alyeska Pipeline Serv. v. Wilderness Soc.*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), the Supreme Court referred to the "American Rule" and observed: "In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." Id. at 247, 95 S.Ct. at 1616. An exception noted is "when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" Id. at 258-59, 95 S.Ct. at 1622, *quoting F.D. Rich Co., Inc. v. United States ex rel. Industrial Lumber Co., Inc.*, 417 U.S. 116, 129, 94 S.Ct. 2157, 2165, 40 L.Ed.2d 703 (1974). There is nothing in the record before us to support an award of attorneys' fees under the American Rule.

[12] Finally, the trial court, applying Texas law, awarded prejudgment interest. Although the Texas law is preempted, we have previously held that prejudgment interest may be awarded under the Warsaw Convention itself. *Domangue v. Eastern Airlines, Inc.*, 722 F.2d 256 (5th Cir. 1984).

The judgment of the district court is reversed as it relates to the amount of recovery and the award of attorneys' fees. It is affirmed as to the allowance of prejudgment interest.

REVERSED and REMANDED for entry of a judgment consistent herewith.

APPENDIX B

BOEHRINGER MANNHEIM DIAGNOSTICS, INC. /f/k/a Hycel, Inc., Plaintiff,

v.

PAN AMERICAN WORLD AIRWAYS, INC., Defendant.

Civ. A. No. H-80-1421.

United States District Court, S. D. Texas, Houston Division.

Nov. 24, 1981.

Owner of blood chemistry analyzer machine sought recovery against airline under Warsaw Convention for damage to analyzer that allegedly occurred during airline's shipment of analyzer from Brazil to Houston, Texas. The District Court, Ely, Senior Circuit Judge, sitting by designation, held that: (1) presumption arose that damage occurred during transportation by air; (2) owner produced sufficient evidence to establish that analyzer was not damaged when it arrived at Brazil airport; (3) crate's height and weight should have alerted airline's employees to risks inherent in tilting crate; (4) airline was additionally liable under doctrine of res ipsa loquitur; (5) airline's attempt to limit its liability to $9.07 per pound by tariff, by reference to former "official" price of gold, was null and void; (6) owner made proper 30-day demand required under Texas law as prerequisite to recovery of attorney fees; (7) reasonable fee for prosecution of case was $15,000; and (8) owner was entitled to

prejudgment interest from date it received damaged analyzer to date of final judgment at rate of seven percent per annum.

Order accordingly.

Alden D. Holford, Burgess & Holford, Houston, Tex., for plaintiff.

T. M. Wall, Hutcheson & Grundy, Houston, Tex. for defendant.

MEMORANDUM OPINION

ELY, senior Circuit Judge, Sitting by Designation.

Plaintiff Hycel, Inc. ("Hycel")[1] seeks recovery against defendant Pan American World Airways, Inc. ("Pan Am") under the Warsaw Convention[2] for damage to its Super 17 Blood Chemistry Analyzer (the "Analyzer") that allegedly occurred during defendant's shipment of the Analyzer from Brazil to Houston, Texas. Defendant denies liability and also contends that in any event the Convention limits its liability to $9.07 per pound.[3] For the reasons set forth in the following opinion the Court rejects defendant's contentions and holds defendant liable

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1. Boehringer Mannheim Diagnostics, Inc. is successor in interest to plaintiff Hycel, Inc. For simplicity, and because plaintiff originally was designated as such, this opinion will refer to plaintiff as "Hycel, Inc." or "Hycel."

2. Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* October 12, 1929. 49 Stat. 3000, T.S. No. 876 (English version at 49 U.S.C. § 1502 note (1976)) (hereinafter referred to as the "Warsaw Convention" or "Convention").

3. *See* Warsaw Convention art. 22(2), (4) (set out in text accompanying note 10 *infra*); Pan Am's First Amended Answer at 5.

for the full amount of the repair cost of the Analyzer, reasonable attorney's fees, and prejudgment interest from the date plaintiff received the damaged Analyzer.

I. *The Shipment*

In the spring of 1978 Hycel exhibited one of its large automated blood analyzers, a "Super 17," at the 1978 Department of Commerce Trade Show held at the United States Trade Center in Sao Paulo, Brazil. Hycel used the Analyzer to run simulated tests that demonstrated how the machine automatically determined the chemical make-up of a patient's blood.

After the four-day trade show Metropolitan Transports, Inc., a Brazilian firm, repacked the Analyzer for its transport to Viracopos Airport in Brazil and its return to the United States. Testimony by the firm's vice-president indicated there was no damage to the instrument at the time it was repacked and no reports of damage during its transport to Viracopos Airport. Pan Am contracted for carriage of the Analyzer by issuing its Air Waybill No. 026-21569564 on June 27, 1978, while the Analyzer was still at the United States Trade Center, and received the instrument at its Viracopos Airport facility on July 14, 1978. Pan Am made no objections to the condition of the crated Analyzer upon its arrival at the airport.

Because Pan Am had no direct flights from Brazil to Houston, Texas, it loaded the crated Analyzer onto a freight plane bound for New York City, then transferred the crate in New York to a passenger plane, a Boeing 747, in which the Analyzer traveled to Intercontinental Airport at Houston, Texas. The transfer in New York required laying the 1860-pound crate on its side so that it would clear the shorter 64-inch-high doors of the passenger

plane. Testimony at trial indicated Pan Am employees tilted the crate by using a somewhat risky procedure in which two or three forklifts push and then catch the crate as it falls. There was no direct testimony to show whether the crate actually was damaged during this process.

On August 22, 1978, a delivery truck arrived to pick up the Analyzer at Pan Am's Houston airport facility for transport to Hycel's plant. The driver and a Pan Am employee discovered then that the crated Analyzer had been damaged. The crate apparently had sustained a severe impact that dented and separated the plywood near the top edge and punched a hole in the top surface. After making a notation of the hole and the damage on the delivery ticket, the driver transported the Analyzer to Hycel. Hycel's traffic manager accepted and signed for the Analyzer, also noting on the ticket the damage and the need for a full inspection. Later the same day Hycel's export coordinator notified Pan Am by letter of the company's intent to file a claim against the airline for the damage to the Analyzer.

II. *Liability*

A. *The Warsaw Convention*

[1] Both parties agree that the Warsaw Convention, which governs the liability of air carriers in internatioal transportation, applies to this case.[4] Plaintiff seeks to hold

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4. *See* Joint Pretrial Order at 7. The United States and Brazil were parties to the Warsaw Convention at the time of the shipment at issue in this case. The United States formally adopted the Convention on July 31, 1934, and the President proclaimed the Treaty ninety days later. *See* Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention,* 80 Harv.L.Rev. 497, 502 (1967). Brazil was an original signatory to the Convention. *See* 49 Stat. 3014 (1934).

defendant liable under Article 18(1) of the Convention, which subjects carriers to liability "for damage sustained in the event of . . . damage to . . . any goods, if the occurrence which caused the damage so sustained took place during the transportation by air." The Convention defines "transportation by air" to "comprise the period during which the baggage or goods are in charge of the carrier, whether in an airport or on board an aircraft." Warsaw Convention art. 18(2). Thus, plaintiff need show only that the Analyzer was in good condition when transportation by air began, *i.e.*, when defendant took charge of the intrument, and that it was damaged when transportation by air was completed. *See, e.g., Dalton v. Delta Airlines, Inc.*, 570 F.2d 1244, 1245 (5th Cir. 1978).

Defendant contends that plaintiff has failed to show that the Analyzer was in good condition upon its arrival at defendant's Viracopos Airport facility on July 14, 1978. Under the Convention, however, plaintiff receives the benefit of a presumption that, subject to proof to the contrary, damage has been the result of an event that took place during the transportation by air if the prior transportation by land "takes place in the performance of a contract for transportation by air, for the purpose of loading, delivery, or transshipment." Warsaw Convention art. 18(3).

[2] Undisputed evidence shows that defendant's Air Waybill for the transport of the Analyzer was issued on June 27, 1978. Since the Waybill is *prima facie* evidence of the conclusion of the contract, *see* Warsaw Convention art. 11(1), land transportation of the Analyzer after June 27 must be deemed transportation for the purpose of loading or delivery in the performance of a contract for transportation by air within the meaning of Article 18(3).

The Court must presume, therefore, that the damage occurred during the transportation by air, unless defendant proves to the contrary. Defendant has come forward with no such evidence.

[3-5] Further, and apart from the presumption of Article 18(3), plaintiff has produced sufficient evidence to establish that the Analyzer was not damaged when it arrived at Viracopos Airport. Testimony by the vice-president of the Brazilian company that repacked the Analyzer at the United States Trade Center indicated the instrument was not damaged then nor during its delivery to Viracopos Airport. It is undisputed that defendant took no exception to the Analyzer's condition upon its arrival at Viracopos on July 14, 1978.[5] Plaintiff has met its burden of proof on this issue.

The Court also rejects defendant's contention that it took "all necessary measures to avoid the damage or that it was impossible for [it] to take such measures" and is thus relieved of liability under Article 20(1) of the Convention. Defendant asserts that because the crated Analyzer was "topheavy" and had no markings to warn of

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5. Contrary to defendant's contention, Article 11(2) does not prevent the Court from considering this evidence. Article 11(2) relates to whether *"statements in the air waybill"* can constitute evidence against the carrier. The undisputed fact that defendant made no objections to the condition of the Analyzer when it arrived at Viracopos does not refer solely to the lack of notations on the Air Waybill, but rather is evidence of the lack of any and all objections in whatever form. *See* Joint Pretrial Order at 4 (Admission of Fact Nos. 7, 8).

Moreover, the carrier's acceptance of the goods "in apparent good order," and the lack of any written exceptions on the Air Waybill, *does* constitute evidence against defendant as to the Analyzer's *apparent* condition. *See* Warsaw Convention art. 11(2); Plaintiff's Exhibit I. The extensive damage to the outside of the crated Analyzer certainly would have been apparent upon its arrival at Viracopos Airport if such damage had existed at that time.

its weight or delicate nature defendant's employees had no way of knowing the risk involved in attempting to lay the Analyzer on its side.

[6, 7] The Court is not persuaded that these facts exonerate defendant from liability for the extensive damage caused the Analyzer in this case. The crate's obviously enormous weight and height should have alerted defendant's employees to the risks inherent in tilting the crate, and the employees in any event could have prevented the sharp blow through more careful handling.[6] Similarly, the Court rejects defendant's contention that plaintiff contributed to the damage by its negligence in not marking warnings on the crate.

B. *Texas Common Law*

[8] On the basis of the facts established in this case the Court is of the opinion that defendant is additionally liable to plaintiff under the Texas common law of negligence by operation of the doctrine of *res ipsa loquitur*. Plaintiff has established (1) that the care and handling of the Analyzer, from its arrival at Viracopos Airport in Brazil to its delivery at Intercontinental Airport—Houston, was under the management and control of defendant, and (2) that the damage to the Analyzer would not ordinarily have occurred in the absence of negligence.

The Court, therefore, applies the doctrine of *res ipsa loquitur* as limited by Texas courts[7] and holds the evidence sufficient to infer negligence on the part of defendant. *See Mobil Chemical Company v. Bell*, 517 S.W.2d

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6. Plaintiff proved at trial that the crate's center of gravity was less than two inches above the center line of the machine.

7. *See Lairsey v. Advance Abrasives Co.*, 528 F.2d 991 (5th Cir. 1976); 1A Moore's Federal Practice ¶ 0.315[2], at 3206 (1978).

245, 250-57 (Tex. 1974); *Honea v. Coca-Cola Bottling Co.*, 143 Tex. 272, 183 S.W.2d 968, 969 (1944). Defendant's liability under Texas law for attorney's fees is discussed in part III(C) *infra*.

III. *Damages*

A. *Cost of Repair*

The parties have agreed that the correct measure of damages is the reasonable cost to plaintiff of repairing the damaged Analyzer.[8] Plaintiff has amply documented its expenditure of $34,054.04 in parts, labor, and overhead for the repair of the Analyzer, taking into account $5,447.60 erroneously included in plaintiff's work order and $4,000.00 erroneously omitted.[9] Defendant objected at trial that plaintiff's figures do not reflect the cost of repair in 1978, the date of damage, since the actual repair occurred in spring of 1980. Plaintiff's witnesses, however, testified that repair costs in 1978 would have been the same, and defendant offered no evidence to the contrary.

B. *The Warsaw Convention Limitation of Liability*

[9] We come now to the core of the parties' dispute over damages: whether the limitation of the carrier's liability for damage to goods as set out in Article 22 of the Warsaw Convention—250 French gold francs per kilogram—is to be converted to U.S. dollars with reference to the former "official" price of gold or with reference to the current free-market price of gold. Plaintiff and defendant have thoroughly and ably briefed the issue, and

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8. *See* Joint Pretrial Order at 7.

9. *See* Plaintiff's Exhibit 26. The parties stipulated in open court to the upward adjustment of $4,000 which reflects chemical testing of the repaired Analyzer.

they have accurately noted the lack of American precedent on this issue. After reviewing the Convention's language and history, and after considering the arguments of policy advanced by counsel for both sides, the Court concludes that defendant's limitation of liability under the Convention is properly determined by reference to the current free-market price of gold. Defendant's attempt, therefore, to limit its liability to $9.07 per pound by tariff—by reference to the former "official" price of gold—is null and void under Article 23 of the Convention as a provision tending to fix a lower limit than that which is laid down in the Convention. *See Saiyed v. Transmediterranean Airways,* 509 F.Supp. 1167 (W.D. Mich. 1981).

The pertinent portions of Article 22 provide:

> (2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram. . . .
>
> . . . .
>
> (4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ miligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.[10]

A brief review of the history of the Convention's liability limitations and of recent developments in the international monetary system reveals the current ambiguity in the

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10. The official language of the Convention is French. *See* 49 Stat. 3000-13 (1934); *Reed v. Wiser,* 555 F.2d 1079, 1082 n.5 (2d Cir.), *cert. denied,* 434 U.S. 922, 98 S.Ct. 399, 54 L.Ed.2d 279 (1977). The United States Senate used the English version, however, in giving its advice and consent in 1934. *See* 49 Stat. 3014 (1934); *Reed v. Wiser,* 555 F.2d at 1082 n.6; Lowenfeld & Mendelsohn, *supra* note 4, at 502.

method for converting "250 francs per kilogram" to U.S. dollars.

1. *The Gold Standard*

The United States has adhered to the original language of the Warsaw Convention, drafted at conferences in Paris and Warsaw in 1925 and 1929, since 1934, when the President proclaimed the Treaty.[11] The drafters designed the Treaty to achieve two goals: first, to set out uniform rules relating to air transportation documentation, and second, to foster the development of the infant aviation industry by limiting their liability. In exchange, the Treaty established a presumption of the carrier's liability for personal injuries or damaged goods. *See Block v. Compagnie Nationale Air France,* 386 F.2d 323, 327 (5th Cir. 1967), *cert. denied,* 392 U.S. 905, 88 S.Ct. 2053, 20 L.Ed.2d 1363 (1968). The liability limitations of Article 22 were expressed in terms of the Poincaré gold franc, a French coin in use during 1929 that contained a fixed amount of gold,[12] and could be converted "into any national currency in round figures." Warsaw Convention art. 22(4). The drafters used gold as the unit of reference, instead of pegging the limits to some particular national currency like the dollar or pound, to avoid fluctuations in currency values and problems that might be caused by

11. For a thorough account of United States participation in the Convention and its subsequent amendments, *see* Lowenfeld & Mendelsohn, *supra* note 4. *See also Block v. Compagnie Nationale Air France,* 386 F.2d 323, 326-30 (5th Cir. 1967), *cert. denied,* 392 U.S. 905, 88 S.Ct. 2053, 20 L.Ed.2d 1363 (1968).

12. *See* Asser, *Golden Limitations of Liability in International Transport Conventions and the Currency Crisis,* 5 J.Mar.L. & Com. 645, 645 (1974). The Poincaré franc has been used in gold clause limitations of liability in all multilateral transportation conventions since 1924. *See id.* at 645-46.

unilateral action by the government whose currency was used in the liability clause—in short, the drafters looked to gold's stability and its tendency to reflect real values better than currency.[13]

In 1929, an ounce of gold was worth approximately twenty U.S. dollars.[14] When the United States devalued the dollar in 1934, however, it established an official gold price of $35 an ounce.[15] The conversion of the liability limitations in the Convention to U.S. dollars remained firmly tied to this rate for nearly 40 years, chiefly because of the inception of the International Monetary Fund (IMF) in 1944.[16] The IMF instituted a system of international currency exchange based on assigned par values for each nation's currency—par values that were tied to the dollar value of gold at $35 an ounce.[17] Because U.S. citizens were prohibited from buying and selling

13. *See* Heller, *The Warsaw Convention and the "Two-Tier" Gold Market*, 7 J. World Trade L. 126, 129 (1973); Heller, *The Value of the Gold Franc—A Different Point of View*, 6 J.Mar.L. & Com. 73, 91-92 (1974); Martin, *The Price of Gold and the Warsaw Convention*, 4 Air L. 70, 71 (1979). *Cf.* Assen, *supra* note 12, at 664 (purpose of gold clause is to establish certainty that the real value of the limitation amount shall be equal regardless of the currency of payment or the time of conversion). *See also* Bureau of Consumer Protection, Civil Aeronautics Board, Memorandum on Warsaw Convention Liability Limits at 6 (March 18, 1980).

14. *See* Lowenfeld & Mendelsohn, *supra* note 4, at 499 n.10

15. Gold Reserve Act of 1934, ch. 6, § 12, 48 Stat. 342 (1934); Presidential Proclamation No. 2072, 48 Stat. 1730 (1934). *See* Asser, *supra* note 12, at 650 & n.13.

16. Congress approved the United States' participation in the IMF in 1945. *See* Bretton Woods Agreements Act. ch. 339, § 2, 59 Stat. 512 (1945) (codified at 22 U.S.C. § 286 (1976)). For a thorough account of the development of the IMF and the recent international currency crisis, see Heller, *The Value of the Gold Franc —A Different Point of View*, 6 J.Mar.L. & Com. 73, 79-91 (1974).

17. *See* Heller, *supra* note 16, at 79-80.

gold,[18] and because IMF nations used the $35 rate in their gold transactions with each other and on the open market, the price of gold on any market varied little from this established value.[19] From 1933 until the early 1970s, therefore, "250 francs per kilogram" was equal to approximately $7.52 per pound at the official rate and at the prevailing market rate.[20]

United States dissatisfaction with the extremely low passenger liability limitation ($8,300 per person) led to proposed revisions of the Convention in the 1950s and 1960s.[21] Although the Hague Protocol of 1955[22] doubled the carriers' liability for personal injury, the United States refused to become a party to the amendment, insisting that the limitation still was too low.[23] In 1966, after 10 years of negotiations and with the prospect of the United States' denunciation of the entire Warsaw Convention, air carriers agreed in Montreal to raise their liability limitations for personal injuries to $75,000 per person.[24] the

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18. *See* Gold Reserve Act of 1934, ch. 6, §§ 3, 6, 48 Stat. 340 (1934) (repealed by Par Value Modification Act of 1973, Pub. L. No. 93-110, 87 Stat. 352 (1973)).

19. *See* Asser, *supra* note 12, at 650; Heller, *supra* note 16, at 81, 95; Heller, *The Warsaw Convention and the "Two-Tier" Gold Market*, 7 J. World Trade L. 126, 128 (1973).

20. *See* 37 Fed. Reg. 11,385 (1972).

21. *See* Lowenfeld & Mendelsohn, *supra* note 4, at 501-16, 532-96.

22. Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, *opened for signature* at The Hague, September 28, 1955.

23. *See* Lowenfeld & Mendelsohn, *supra* note 4, at 504-16.

24. *See id.* at 532-99; Heller, *supra* note 16, at 77. The Civil Aeronautics Board approved the agreement on May 13, 1966. *See* 31 Fed. Reg. 7302 (1966) (CAB Order E-23680, Dkt. 17325).

limitation for goods, however, remained unchanged at 250 gold francs per kilogram.

Events in the late 1960s and 1970s saw an end to the stability of the U. S. dollar value of gold. In 1968 the IMF countries stopped buying and selling gold on the free market at the official $35-an-ounce rate, fostering a new free market for newly minted and privately held gold.[25] IMF countries retained the official gold rate solely for transactions among their central banks and permitted the free-market price to differ from their currencies' par value.[26] This "two-tier" gold market generated a free-market price for gold that quickly exceeded $35 an ounce.[27]

In August 1971 the President announced that the United States no longer would convert the dollar into gold reserves.[28] This decision not only meant that an "official" U. S. dollar value for gold became purely hypothetical, but also cast doubt on the use of gold as a significant element in the IMF system of international currency transactions.[29] The United States devalued the dol-

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25. *See* Asser, *supra* note 12, at 650; Heller, *supra* note 16, at 82.

26. *See* H.R.Rep. No. 203, 93d Cong., 1st Sess. 12, *reprinted in* [1973] U.S. Code Cong. & Ad. News 2050, 2061; Heller, *supra* note 16, at 82.

27. *See* Asser, *supra* note 12, at 651; Heller, *supra* note 16, at 82; Heller *supra* note 19, at 128-29.

28. *See* S.Rep. No. 678, 92 Cong., 2d Sess. 4, *reprinted in* [1972] U.S. Code Cong. & Ad. News 2209, 2212. *See also* Asser, *supra* note 12, at 651; Heller, *supra* note 19, at 127; Martin, *supra* note 13, at 71.

29. Heller, *supra* note 16, at 83. *Cf. Asser, supra* note 12, at 664-65 (event may have eliminated factual link of gold to currencies but did not affect formal link established by currencies' par values).

lar in 1971[30] and again in 1973,[31] increasing the "official" price of gold to $38 and then to $42.22 an ounce. In 1976 the United States ended the 43-year link between the dollar and gold by ratifying amendments to the IMF agreement that would abolish the concept of an official price of gold.[32] The "official"price of $42.22 an ounce was finally abolished on April 1, 1978, the date upon which the IMF amendments became effective.[33]

2. *The CAB and Airline Tariffs*

Until 1971 the Civil Aeronautics Board (CAB) had set air carrier liability for damaged goods under the Convention at $7.52 per pound, using the gold-dollar conversion rate of $35 an ounce.[34] Because the CAB calculated the airlines' limitations based on the "official" gold price, it saw no need to require revision of the airlines' tariffs to reflect the new free-market gold price that developed under the two-tier market system after 1968. After the 1971 devaluation of the dollar, the CAB directed airlines to file tariffs that reflected the new "official" U. S. gold price.[35] Again in 1973 the CAB ordered revised tariffs

30. The United States agreed to the devaluation in December 1971 and passed implementing legislation in 1972. Par Value Modification Act of 1972, Pub.L. No. 92-268, § 2, 86 Stat. 116 (1972). *See* Heller *supra* note 19, at 127.

31. Par Value Modification Act of 1973. Pub.L. No. 93-110, § 1, 87 Stat. 352 (1973).

32. Act of Oct. 19, 1976, Pub. L. No. 94-564, 90 Stat. 266υ (1976). *See* S. Rep. No. 1148, 94th Cong., 2d Session. 10-15, *reprinted in* [1976] U.S. Code Cong. & Ad. News 5935, 5944-49.

33. *See* 22 U.S.C. § 286a note (Supp. II 1978); Martin, *supra* note 13, at 71.

34. *See* 37 Fed. Reg. 11,385 (1972).

35. Order 72-6-7, Dkt. 24521, adopted June 2, 1972, 37 Fed. Reg. 11,384-85 (1972).

to reflect the second devaluation.[36] The carriers complied and filed tariffs that set their liability limit after 1973 at $20 per kilogram of damaged goods, or $9.07 per pound.[37]

When the United States abandoned its official price for gold in 1978, however, the CAB took no action to require revised tariffs. In an exchange of memoranda between March 1980 and May 1981, the Board's Bureau of Compliance and Consumer Protection suggested that the abolition of an official gold price "appear[s] to have removed the legal basis for using" the limitation of $9.07 per pound.[38] The Bureau later withdrew this suggestion, stating that although "it is not entirely clear how the limits should be converted,"[39] the Board should continue to engage in the "legal fiction" that an official gold price exists in order "to fulfill its obligation to observe, to the extent possible, the requirements of . . . the Warsaw Convention."[40]

[10] Thus, to the present day, during a time in which the free-market price of gold has risen to more than $400 an ounce,[41] the CAB has allowed airlines to calculate

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36. Order 74-1-16, Dkt. 26274, adopted Jan. 3, 1974, 39 Fed. Reg. 1526 (1974). *See* 14 C.F.R. § 221.38(j) (1981) (requiring the limitations to be set out in carrier tariffs).

37. *See* Defendant's Exhibit 16.

38. *See* Bureau of Consumer Protection, Civil Aeronautics Board, *supra* note 13, at 4.

39. Bureau of Compliance and Consumer Protection, Civil Aeronautics Board, Memorandum on Warsaw Convention Liability Limits at 5 (May 20, 1981).

40. *Id.* at 6. In his commentary on the dilemma Asser concluded that "[t]here appears to be no logical solution." Asser, *supra* note 12, at 666.

41. *See* Plaintiff's Exhibit 39 (*Wall Street Journal* quotations of gold prices for June 27, 1978).

their limitation of liability under the Warsaw Convention based on the artificial, non-existent figure of $42.22 an ounce.

3. *The Free-Market Price of Gold*

Allowing defendant to limit its liability under the Convention based on the now-abolished "official" gold price of $42.22 an ounce would perpetrate a legal fiction of the purest kind. The Court finds no justification in the language or history of the Warsaw Convention to justify such a holding in this case.[42]

Apparently no reported American decision has addressed the issue since the official gold price was abolished in 1978. Counsel cite no cases on point and the Court is also unable to find precedent.[43] One recent Second Circuit decision, however, assumed in dicta that the free-market price of gold now applies to conversion of the Convention's liability limitations. *See Reed v. Wiser,* 555 F.2d 1079, 1089 n.12 (2d Cir.), *cert. denied,* 434 U.S. 922, 98 S.Ct. 399, 54 L.Ed.2d 279 (1977).[44] The handful of foreign tribunals that have addressed the issue have not been uniform in result.[45]

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42. One must distinguish this case from the issue whether an *existing* official gold price must be used in converting the Convention limitations. *See* discussion in note 46 *infra.*

43. Moreover, there appears to be no reported American cases involving a challenge to the use of the official price of gold *before* it was abolished in 1978.

44. Another recent case involved a plaintiff who refused to accept a settlement of $20 from the defendant carrier for loss of three valuable pieces of jewelry weighing less than one kilogram. Plaintiff, however, argued not that the limit was more than $20 per kilogram, but that the limitations did not apply in his case. *See Greely v. KLM Royal Dutch Airlines,* 85 F.R.D. 697 (D.C. N.Y. 1980).

45. *See Hornline v. Societe Nationale des Petroles Aquitaine,* Decision of April 14, 1972 (N.J. 1972, 269) (Dutch High Council

Without the benefit of precedent, therefore, the Court must base its decision on a close reading and interpretation of Article 22 of the Convention. The Court must look to

> the ordinary meaning of the words in the context in which the words are used, the title and statement of purpose, the negotiation of the agreement, drafts and records of deliberations, negotiating history, a party's unilateral statement of understanding, the subsequent practice of parties, change of circumstances relating to performance, compatibility with international law and general law.

Block v. Compagnie Nationale Air France, 386 F.2d 323, 337 (5th Cir. 1967), *cert. denied,* 392 U.S. 905, 88 S.Ct. 2053, 20 L.Ed.2d 1363 (1968).

[11] In light of the historical analysis discussed above, the Court finds nothing in these considerations upon which to conclude that it should employ the fiction of an official U. S. price of gold in converting the limitation sums expressed in the Convention. The only proper basis for determining defendant's liability limitation, at least since 1978,[46] is with reference to the free-market price of gold.

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holding that the official price of gold should be used in applying the analogous limitation provisions of the Shipowners' Liability Convention). The *Hornline* case is extensively reviewed in Asser, *supra* note 12, at 652-61. *See also* Heller, *supra* note 16, at 101-02.

Heller describes a recent Swedish decision in which the judge calculated the defendant's liability, apparently under the Shipowners' Liability Convention, based on the price of gold on the free market at the time of the collision. Heller *supra* note 16, at 99-100 (quoting *In re Saga,* decision of October 2, 1973). *See also* Asser, *supra* note 12, at 662.

46. Most of the journal articles to date have addressed whether the market price of gold should prevail over an existing "official"

[12] Because plaintiff has proved that the market price of gold had exceeded $400 an ounce by June 1978, defendant's tariff, which purports to limit its liability to $9.07 per pound, is null and void under Article 23 as a provision tending to fix a lower limit than that which is laid down in the Convention.[47] *See Saiyed v. Transmediterranean Airways,* 509 F.Supp. 1167 (W.D. Mich. 1981).

The maximum recovery plaintiff seeks does not exceed defendant's liability limit converted at the free-market price of gold at the earliest relevant date in this case—the Air Waybill date of June 27, 1978.[48] Therefore, the

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price. *See* authorities cited in notes 12 & 13 *supra.* Without responding to the merits of these authors' arguments—whether the intent of the Convention is best served by applying an official price or a market price—the Court finds no support for application of an official price that was abolished in 1978. Indeed, the authors themselves admit as much. *See, e.g.,* Asser, *supra* note 12, at 666 (without an official gold price there "appears to be no logical solution"); Martin, *supra* note 13, at 75-76 (recommending legislative solutions to problem).

47. In so holding, the Court is aware that the liability limitations as to goods may be unrealistically high and that recent proposed amendments to the Convention would stabilize liability at approximately $9.07 per pound. *See* Bureau of Consumer Protection, Civil Aeronautics Board *supra* note 13, at 5; *Aviation Protocols, Hearing Before the Senate Committee on Foreign Relations,* 95th Cong., 1st Sess. 47 (1977). The amendments, Montreal Protocols 3 and 4, were submitted to the United States Senate for ratification on Jan. 14, 1977, however, and no action has been taken since that time. *See Hearing, supra,* at 1; Sheinfeld, *From Warsaw to Tenerife: A Chronological Analysis of the Liability Limitations Imposed Pursuant to the Warsaw Convention,* 45 J. Air. L. & Com. 653, 681 (1980). Ratification in the near future appears uncertain. *See* Martin, *supra* note 13, at 73-74, 76.

48. Plaintiff seeks a maximum recovery in damages, attorney's fees, and prejudgment interest of approximately $75,000. Defendant's liability under Article 22 for damage to the Analyzer, converted with reference to gold at $400 an ounce, is approximately $85.94 per pound, or $159,848.40. *See* Bureau of Consumer Protection, Civil Aeronautics Board, *supra* note 13 at 5.

Court need not address the secondary issues that defendant has raised: *e.g.*, whether to use the market price of gold at the time of the contract,[49] the accident,[50] the judgment,[51] or payment on the judgment;[52] and whether to use the London market, the Zurich market, or some other gold market quotation.

C. *Attorney's Fees*

[13, 14] The Court finds that plaintiff has made the proper 30-day demand required under Texas law as a prerequisite to recovery of attorney's fees. *See* Tex. Rev. Civ. Stat. Ann. art. 2226 (Vernon 1960); *Jones v. Kelley*, 614 S.W.2d 95, 100 (Tex. 1981). The complaint itself contains a specific demand for payment, and it is an undisputed fact that defendant has not tendered payment. *See* Joint Pretrial Order at 8. Because defendant has been found liable under Texas law, *see* part II(B) *supra*, this Court, sitting in diversity, should follow the Texas law allowing recovery of attorney's fees in this case. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421

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49. Plaintiff suggests that using the date of contract for the conversion will avoid the administrative problems defendant foresees. "[T]he carrier can charge for goods or baggage . . . taking into account the market value of gold by on-line computer or periodically issued books, much as fares are done there days." Plaintiff's Additional Memorandum at 8.

50. A Swedish judge used this reference point. *See* note 45 *supra*.

51. Nations that adopted the Hague Protocol, *see* note 22 *supra*, are bound by an amendment to Article 22(4) that provides: "Conversion of the sums into national currencies other than gold shall, in the case of judicial proceedings, be made according to the gold value of such currencies at the date of judgment. . . ." *See* Asser, *supra* note 12, at 645, 649-50.

52. A leading treatise on the Convention criticizes this date as an unintended protection of judgment creditors. *See* H. Drion, Limitation of Liability in International Air Law 189-90 (1954).

U.S. 240, 259 n.31, 95 S.Ct. 1612, 1622 n.31, 44 L.Ed. 2d 141 (1974).

[15, 17] The Court rejects defendant's contention that the Warsaw Convention preempts state law which would otherwise award attorney's fees. Article 24 provides that "any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention." Warsaw Convention art. 24(1). The Convention makes no mention of attorney's fees. Cases relied on by defendant in its brief turn on the Interstate Commerce Act's express provisions governing attorney's fees. *See, e.g., Nationwide Horse Carriers, Inc. v. Johnston,* 519 S.W.2d 163 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.). Moreover, it is clear that other nations party to this Treaty do not consider it to preempt awards of attorney's fees. *See* Lowenfeld & Mendelsohn, *supra* note 4, at 507-09 (discussing provision in Hague Protocol specifically removing awards of attorney's fees from the liability limitations).

The Court holds that allowing plaintiff recovery of reasonable attorney's fees, as provided by Texas law, does not contravene the "conditions and limitations set out in [the] Convention" in violation of Article 24(1). The Court has determined that a reasonable fee for prosecution of this case by plaintiff is $15,000, and so awards such amount.[53]

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53. The question whether attorney's fees might be subject to the limitations set out in Article 22 no longer exists in this case in light of the Court's holding in part III(B) above. *See* note 48 *supra;* Drion, *supra* note 52, at 114-15.

D. *Prejudgment Interest*

[18] Texas law clearly permits courts at their discretion to award equitable prejudgment interest as an element of damages. *Dallas-Fort Worth Regional Airport Board v. Combustion Equipment Associates, Inc.*, 623 F.2d 1032 (5th Cir. 1980); *Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480 (Tex. 1978). Further, the trial court has discretion to choose the applicable rate and is not bound by the 6-percent rate applicable to written contracts and open accounts. *Dallas-Fort Worth Regional Airport Board*, 623 F.2d at 1042; *Larcon Petroleum, Inc. v. Autotronic Systems*, 576 S.W. 2d 873 (Tex. Civ. App.—Houston [14th Dist.] 1978). *See* Tex. Rev. Civ. Stat. Ann. art. 5069-1.03 (Vernon 1971).

[19] The Court holds that plaintiff is entitled to prejudgment interest from August 22, 1978, the date it received the damaged Analyzer, to the date of final judgment herein at the rate of 7 percent per annum.

The Amended Findings of Fact and Conclusions of Law filed previously by the Court herein are hereby incorporated and made a part of this Opinion. Pursuant to Rule 52(a), Federal Rules of Civil Procedure, this Memorandum Opinion constitutes the Findings of Fact and Conclusions of Law by the Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-80-1421

BOEHRINGER MANNHEIM DIAGNOSTICS,
INC. f/k/a HYCEL, INC.

v.

PAN AMERICAN WORLD AIRWAYS, INC.

(Filed Nov. 16, 1981)

AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact and Conclusions of Law and a Partial Judgment previously having been filed and entered in this cause, the Court files these Amended Findings of Fact and Conclusions of Law, the purpose of which being to correct a certain typographical error appearing in Finding of Fact Number Six.

This cause came on for trial and the Court, having heard the evidence and considered the stipulated facts, finds the facts and states the conclusions of law thereon as follows:

FINDINGS OF FACT

1. That on June 27, 1978, defendant Pan American World Airways, Inc. ("Pan American") contracted by its Air Waybill No. 026-21569564 to transport for hire by air from Viracopos airport in Brazil to Intercontinental Airport—Houston a Super 17 Blood Chemistry

Analyzer (the "Analyzer") owned by plaintiff Hycel, Inc. ("Hycel").

2. That on July 14, 1978, Pan American received the Analyzer at Viracopos airport in good condition.

3. That on August 22, 1978, Pan American delivered the Analyzer at Intercontinental Airport—Houston in damaged condition.

4. That Pan American received written notice of complaint of the damage from the consignee by its agent at the time of delivery and again from Hycel not later than August 28, 1978.

5. That the reasonable cost of repair of the damage to the Analyzer was $34,054.04.

6. That the care and handling of the Analyzer, from its receipt by Pan American at Viracopos airport to its delivery by Pan American at Intercontinental Airport—Houston, was under the management and control of Pan American.

7. That the damage to the Analyzer and to its packing crate was such that it would not ordinarily have occurred in the absence of negligence in the care and handling of the Analyzer.

8. That the damage to the Analyzer was due to the negligence of Pan American, its agents, servants or employees, in the care and handling of the Analyzer.

9. That such negligence was a proximate cause of the damage to the Analyzer.

10. That not later than July 7, 1980, Hycel presented its claim for the damage to the Analyzer to Pan American.

11. That at the expiration of thirty (30) days after July 7, 1980, payment for the just amount owing had not been tendered and its collection required an attorney.

12. That plaintiff Boehringer Mannheim Diagnostics, Inc. is successor to Hycel, Inc.'s interest in this action.

13. That both the United States and Brazil have been, since before 1978, High Contracting Parties to the Convention for the Unification of Certain Rules Relating to International Transportation by Air, 49 STAT. 3000 (the "Warsaw Convention").

CONCLUSIONS OF LAW

1. That defendant is liable to plaintiff for the damage to the Analyzer under the Warsaw Convention.

2. That defendant is liable to plaintiff for the damage to the Analyzer under the common law of negligence.

3. That plaintiff is entitled to recover from Pan American the reasonable cost of repair, $34,054.04, subject to the Court's further determination whether defendant's liability therefor is limited to $9.07 per pound.

4. That plaintiff is also entitled to recover from defendant pre-judgment interest on such amount as is recovered for repair cost at seven percent (7%) per annum from August 22, 1978.

5. That plaintiff is further entitled to recover from defendant reasonable attorney's fees, in an amount to be determined, subject to the Court's further determination whether defendant's liability for attorney's fees as well as for the repair costs is limited to $9.07 per pound.

It is so ORDERED, and counsel for plaintiff will submit an appropriate partial judgment in accordance herewith.

Signed this 16th day of November, 1981.

/s/ WALTER ELY
Walter Ely
Senior Circuit Judge, United States Court of Appeals for the Ninth Circuit
Sitting by Designation

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-80-1421

BOEHRINGER MANNHEIM DIAGNOSTICS,
INC. f/k/a HYCEL, INC.
Plaintiff

v.

PAN AMERICAN WORLD AIRWAYS, INC.
Defendant

(Filed Nov. 24, 1981)

FINAL JUDGMENT

This action came on for trial before the Court, Honorable Walter Ely, Senior Circuit Judge, United States Court of Appeals for the Ninth Circuit, presiding, and the issues having been duly tried, and a Memorandum Opinion incorporating Findings of Fact and Conclusions of Law having been filed, it is hereby

ORDERED, ADJUDGED, and DECREED that plaintiff Boehringer Diagnostics, Inc. is entitled to recover of defendant Pan American World Airways, Inc., the sum of Thirty-Four Thousand Fifty Four and 04/100 Dollars ($34,054.04) with interest thereon at the rate of seven percent (7%) per annum from August 22, 1978, until entry of this Final Judgment; it is

FURTHER ORDERED, ADJUDGED, and DECREED that plaintiff Boehringer Diagnostics, Inc. is entitled to recover of defendant Pan American World Air-

ways, Inc. reasonable attorney's fees in the amount of Fifteen Thousand Dollars ($15,000.00); it is

FURTHER ORDERED, ADJUDGED, and DECREED that plaintiff Boehringer Diagnostics, Inc. is entitled to recover of defendant Pan American World Airways, Inc. its costs of suit; it is

FURTHER ORDERED, ADJUDGED, and DECREED that plaintiff Boehringer Diagnostics, Inc. is entitled to recover of defendant Pan American World Airways, Inc. interest on the judgment at the applicable legal rate from date of entry of this Final Judgment until paid.

Signed this 24th day of November, 1981.

/s/ WALTER ELY
Walter Ely
Senior Circuit Judge
United States Court of Appeals
for the Ninth Circuit
Sitting by Designation

APPENDIX C

The court of appeals rendered only its opinion (App. A, supra, 1a to 8a) without separate judgment.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-2519

BOEHRINGER MANNHEIM DIAGNOSTICS, INC., F/K/A HYCEL, INC.,
Plaintiff-Appellee,

v.

PAN AMERICAN WORLD AIRWAYS, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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ON PETITION FOR REHEARING

(August 21, 1984)

Before TUTTLE,* POLITZ and GARWOOD, Circuit Judges.

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*TUTTLE, Circuit Judge, sitting by designation.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ HENRY A. POLITZ
United States Circuit Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 81-2519

BOEHRINGER MANNHEIM DIAGNOSTICS,
INC., F/K/A HYCEL, INC.,
Plaintiff-Appellee,

v.

PAN AMERICAN WORLD AIRWAYS, INC.,
Defendant-Appellant.

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

(Filed October 12, 1984)

Notice is hereby given that Boehringer Mannheim Diagnostics, Inc., f/k/a Hycel, Inc., the plaintiff above named, hereby appeals to the Supreme Court of the United States from the part of the final judgment entered in this action on July 18, 1984 which reverses the District

Court's award of attorney's fees under Tex. Rev. Civ. Stat. Ann. art. 2226, Boehringer Mannheim Diagnostics, Inc.'s Petition for Rehearing directed thereto having been denied on August 21, 1984.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

/s/ ALDEN D. HOLFORD
Alden D. Holford
Attorney for Boehringer Mannheim Diagnostics, Inc., Appellee
7322 Southwest Freeway, Suite 670
Houston, Texas 77074
(713) 271-7545

CERTIFICATE OF SERVICE

I, Alden D. Holford, the attorney for Boehringer Mannheim Diagnostics, Inc., appellee herein and appellant to the Supreme Court of the United States, and a member of the Bar of the Supreme Court of the United States, hereby certifies that, on the 10th day of October, 1984, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on the other party thereto, as follows:

On Pan American World Airways, Inc., appellant herein, by mailing a copy in a duty addressed envelope, with first class postage prepaid, by certified mail #P561 117 119, return receipt requested, to its attorneys of record, as follows:

TO: Messrs. Stephen J. Fearon and
Lawrence Mentz
Condon & Forsyth
1251 Avenue of the Americas
New York, New York 10020

Date: October 10, 1984

/s/ ALDEN D. HOLFORD
Alden D. Holford
Attorney for Boehringer Mannheim
Diagnostics, Inc., Appellee
7322 Southwest Freeway, Suite 670
Houston, Texas 77074
(713) 271-7545

APPENDIX E

CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO INTERNATIONAL TRANSPORTATION BY AIR

WARSAW CONVENTION

49 Stat. 3000

CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO INTERNATIONAL TRANSPORTATION BY AIR

THE PRESIDENT OF THE GERMAN REICH, THE FEDERAL PRESIDENT OF THE REPUBLIC OF AUSTRIA, HIS MAJESTY THE KING OF THE BELGIANS, THE PRESIDENT OF THE UNITED STATES OF BRAZIL, HIS MAJESTY THE KING OF THE BULGARIANS, THE PRESIDENT OF THE NATIONALIST GOVERNMENT OF CHINA, HIS MAJESTY THE KING OF DENMARK AND ICELAND, HIS MAJESTY THE KING OF EGYPT, HIS MAJESTY THE KING OF SPAIN, THE CHIEF OF STATE OF THE REPUBLIC OF ESTONIA, THE PRESIDENT OF THE REPUBLIC OF FINLAND, THE PRESIDENT OF THE FRENCH REPUBLIC, HIS MAJESTY THE KING OF GREAT BRITAIN, IRELAND, AND THE BRITISH DOMINIONS BEYOND THE SEAS, EMPEROR OF INDIA, THE PRESIDENT OF THE HELLENIC REPUBLIC, HIS MOST SERENE HIGHNESS THE REGENT OF THE KINGDOM OF HUNGARY, HIS MAJESTY THE KING OF ITALY, HIS MAJESTY THE EMPEROR OF JAPAN, THE PRESIDENT OF THE REPUBLIC OF LATVIA, HER ROYAL HIGHNESS THE GRAND DUCHESS OF LUXEMBURG, THE PRESIDENT OF THE UNITED MEXICAN STATES,

HIS MAJESTY THE KING OF NORWAY, HER MAJESTY THE QUEEN OF THE NETHERLANDS, THE PRESIDENT OF THE REPUBLIC OF POLAND, HIS MAJESTY THE KING OF RUMANIA, HIS MAJESTY THE KING OF SWEDEN, THE SWISS FEDERAL COUNCIL, THE PRESIDENT OF THE CZECHOSLOVAK REPUBLIC, THE CENTRAL EXECUTIVE COMMITTEE OF THE UNION OF SOVIET SOCIALIST REPUBLICS, THE PRESIDENT OF THE UNITED STATES OF VENEZUELA, HIS MAJESTY THE KING OF YUGOSLAVIA:

Having recognized the advantage of regulating in a uniform manner the conditions of international transportation by air in respect of the documents used for such transportation and of the liability of the carrier,

Have nominated to this end their respective Plenipotentiaries, who, being thereto duly authorized, have concluded and signed the following convention:

CHAPTER I. SCOPE—DEFINITIONS

Article 1

(1) This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise.

(2) For the purposes of this convention the expression "international transportation" shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories

of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this convention.

(3) Transportation to be performed by several successive air carriers shall be deemed, for the purposes of this convention, to be one undivided transportation, if it has been regarded by the parties as a single operation, whether it has been agreed upon under the form of a single contract or of a series of contracts, and it shall not lose its international character merely because one contract or a series of contracts is to be performed entirely within a territory subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party.

Article 2

(1) This convention shall apply to transportation performed by the state or by legal entities constituted under public law provided it falls within the conditions laid down in article 1.

(2) This convention shall not apply to transportation performed under the terms of any international postal convention.

CHAPTER II. TRANSPORTATION DOCUMENTS

SECTION I—PASSENGER TICKET

Article 3

(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

(a) The place and date of issue;

(b) The place of departure and of destination;

(c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;

(d) The name and address of the carrier or carriers;

(e) A statement that the transportation is subject to the rules relating to liability established by this convention.

(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.

SECTION II.—BAGGAGE CHECK

Article 4

(1) For the transportation of baggage, other than small personal objects of which the passenger takes charge himself, the carrier must deliver a baggage check.

(2) The baggage check shall be made out in duplicate, one part for the passenger and the other part for the carrier.

(3) The baggage check shall contain the following particulars:

(a) The place and date of issue;

(b) The place of departure and of destination;

(c) The name and address of the carrier or carriers;

(d) The number of the passenger ticket;

(e) A statement that delivery of the baggage will be made to the bearer of the baggage check;

(f) The number and weight of the packages;

(g) The amount of the value declared in accordance with article 22 (2);

(h) A statement that the transportation is subject to the rules relating to liability established by this convention.

(4) The absence, irregularity, or loss of the baggage check shall not affect the existence or the validity of the contract of transportation which shall none the less be subject to the rules of this convention. Nevertheless, if

the carrier accepts baggage without a baggage check having been delivered, or if the baggage check does not contain the particulars set out at (*d*), (*f*), and (*h*) above, the carrier shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liability.

SECTION III.—AIR WAYBILL

Article 5

(1) Every carrier of goods has the right to require the consignor to make out and hand over to him a document called an "air waybill": every consignor has the right to require the carrier to accept this document.

(2) The absence, irregularity, or loss of this document shall not affect the existence or the validity of the contract of transportation which shall, subject to the provisions of article 9, be none the less governed by the rules of this convention.

Article 6

(1) The air waybill shall be made out by the consignor in three original parts and be handed over with the goods.

(2) The first part shall be marked "for the carrier", and shall be signed by the consignor. The second part shall be marked "for the consignee"; it shall be signed by the consignor and by the carrier and shall accompany the goods. The third part shall be signed by the carrier and handed by him to the consignor after the goods have been accepted.

(3) The carrier shall sign on acceptance of the goods.

(4) The signature of the carrier may be stamped; that of the consignor may be printed or stamped.

(5) If, at the request of the consignor, the carrier makes out the air waybill, he shall be deemed, subject to proof to the contrary, to have done so on behalf of the consignor.

Article 7

The carrier of goods has the right to require the consignor to make out separate waybills when there is more than one package.

Article 8

The air waybill shall contain the following particulars:

(*a*) The place and date of its execution;

(*b*) The place of departure and of destination;

(*c*) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right the alteration shall not have the effect of depriving the transportation of its international character;

(*d*) The name and address of the consignor;

(*e*) The name and address of the first carrier;

(*f*) The name and address of the consignee, if the case so requires;

(*g*) The nature of the goods;

(*h*) The number of packages, the method of packing, and the particular marks or numbers upon them;

(*i*) The weight, the quantity, the volume, or dimensions of the goods;

(*j*) The apparent condition of the goods and of the packing;

(*k*) The freight, if it has been agreed upon, the date and place of payment, and the person who is to pay it;

(*l*) If the goods are sent for payment on delivery, the price of the goods, and, if the case so requires, the amount of the expenses incurred;

(*m*) The amount of the value declared in accordance with article 22 (2);

(*n*) The number of parts of the air waybill;

(*o*) The documents handed to the carrier to accompany the air waybill;

(*p*) The time fixed for the completion of the transportation and a brief note of the route to be followed, if these matters have been agreed upon;

(*q*) A statement that the transportation is subject to the rules relating to liability established by this convention

Article 9

If the carrier accepts goods without an air waybill having been made out, or if the air waybill does not contain all the particulars set out in article 8 (*a*) to (*i*), inclusive, and (*q*), the carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability.

Article 10

(1) The consignor shall be responsible for the correctness of the particulars and statements relating to the goods which he inserts in the air waybill.

(2) The consignor shall be liable for all damages suffered by the carrier or any other person by reason of the irregularity, incorrectness or incompleteness of the said particulars and statements.

Article 11

(1) The air waybill shall be *prima facie* evidence of the conclusion of the contract, of the receipt of the goods and of the conditions of transportation.

(2) The statements in the air waybill relating to the weight, dimensions, and packing of the goods, as well as those relating to the number of packages, shall be *prima facie* evidence of the facts stated; those relating to the quantity, volume, and condition of the goods shall not constitute evidence against the carrier except so far as they both have been, and are stated in the air waybill to have been, checked by him in the presence of the consignor, or relate to the apparent condition of the goods.

Article 12

(1) Subject to his liability to carry out all his obligations under the contract of transportation, the consignor shall have the right to dispose of the goods by withdrawing them at the airport of departure or destination, or by stopping them in the course of the journey on any landing, or by calling for them to be delivered at the place of destination, or in the course of the journey to a person other than the consignee named in the air waybill, or by

requiring them to be returned to the airport of departure. He must not exercise this right of disposition in such a way as to prejudice the carrier or other consignors, and he must repay any expenses occasioned by the exercise of this right.

(2) If it is impossible to carry out the orders of the consignor the carrier must so inform him forthwith.

(3) If the carrier obeys the orders of the consignor for the disposition of the goods without requiring the production of the part of the air waybill delivered to the latter, he will be liable, without prejudice to his right of recovery from the consignor, for any damage which may be caused thereby to any person who is lawfully in possession of that part of the air waybill.

(4) The right conferred on the consignor shall cease at the moment when that of the consignee begins in accordance with article 13, below. Nevertheless, if the consignee declines to accept the waybill or the goods, or if he cannot be communicated with, the consignor shall resume his right of disposition.

Article 13

(1) Except in the circumstances set out in the preceding article, the consignee shall be entitled, on arrival of the goods at the place of destination, to require the carrier to hand over to him the air waybill and to deliver the goods to him, on payment of the charges due and on complying with the conditions of transportation set out in the air waybill.

(2) Unless it is otherwise agreed, it shall be the duty of the carrier to give notice to the consignee as soon as the goods arrive.

(3) If the carrier admits the loss of goods, or if the goods have not arrived at the expiration of seven days after the date on which they ought to have arrived, the consignee shall be entitled to put into force against the carrier the rights which flow from the contract of transportation.

Article 14

The consignor and the consignee can respectively enforce all the rights given them by articles 12 and 13, each in his own name, whether he is acting in his own interest or in the interest of another, provided that he carries out the obligations imposed by the contract.

Article 15

(1) Articles 12, 13, and 14 shall not affect either the relations of the consignor and the consignee with each other or the relations of third parties whose rights are derived either from the consignor or from the consignee.

(2) The provisions of articles 12, 13, and 14 can only be varied by express provision in the air waybill.

Article 16

(1) The consignor must furnish such information and attach to the air waybill such documents as are necessary to meet the formalities of customs, octroi, or police before the goods can be delivered to the consignee. The consignor shall be liable to the carrier for any damage occasioned by the absence, insufficiency, or irregularity of any such information or documents, unless the damage is due to the fault of the carrier or his agents.

(2) The carrier is under no obligation to enquire into the correctness or sufficiency of such information or documents.

CHAPTER III. LIABILITY OF THE CARRIER

Article 17

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 18

(1) The carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air.

(2) The transportation by air within the meaning of the preceding paragraph shall comprise the period during which the baggage or goods are in charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever.

(3) The period of the transportation by air shall not extend to any transportation by land, by sea, or by river performed outside an airport. If, however, such transportation takes place in the performance of a contract for transportation by air, for the purpose of loading, delivery

or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the transportation by air.

Article 19

The carrier shall be liable for damage occasioned by delay in the transportation by air of passengers, baggage, or goods.

Article 20

(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

(2) In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft, or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

Article 21

If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability.

Article 22

(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of

the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limted to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that this sum is greater than the actual value to the consignor at delivery.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger.

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

Article 23

Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this convention shall be null and void, but the nullity of any such provision shall not involve the nullity of the whole contract, which shall remain subject to the provisions of this convention.

Article 24

(1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.

(2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

Article 25

(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

(2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

Article 26

(1) Receipt by the person entitled to the delivery of baggage or goods without complaint shall be *prima facie* evidence that the same have been delivered in good condition and in accordance with the document of transportation.

(2) In case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery

of the damage, and, at the latest, within 3 days from the date of receipt in the case of baggage and 7 days from the date of receipt in the case of goods. In case of delay the complaint must be made at the latest within 14 days from the date on which the baggage or goods have been placed at his disposal.

(3) Every complaint must be made in writing upon the document of transportation or by separate notice in writing dispatched within the times aforesaid.

(4) Failinig complaint within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on his part.

Article 27

In the case of the death of the person liable, an action for damages lies in accordance with the terms of this convention against those legally representing his estate.

Article 28

(1) An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination.

(2) Questions of procedure shall be governed by the law of the court to which the case is submitted.

Article 29

(1) The right to damages shall be extinguished if an action is not brought within 2 years, reckoned from the

date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the transportation stopped.

(2) The method of calculating the period of limitation shall be determined by the law of the court to which the case is submitted.

Article 30

(1) In the case of transportation to be performed by various successive carriers and falling within the definition set out in the third paragraph of article 1, each carrier who accepts passengers, baggage or goods shall be subject to the rules set out in this convention, and shall be deemed to be one of the contracting parties to the contract of transportation insofar as the contract deals with that part of the transportation which is performed under his supervision.

(2) In the case of transportation of this nature, the passenger or his representative can take action only against the carrier who performed the transportation during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.

(3) As regards baggage or goods, the passenger or consignor shall have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery shall have a right of action against the last carrier, and further, each may take action against the carrier who performed the transportation during which the destruction, loss, damage, or delay took place. These carriers shall be jointly and severally liable to the passenger or to the consignor or consignee.

Chapter IV. Provisions Relating to Combined Transportation

Article 31

(1) In the case of combined transportation performed partly by air and partly by any other mode of transportation, the provisions of this convention shall apply only to the transportation by air, provided that the transportation by air falls within the terms of article 1.

(2) Nothing in this convention shall prevent the parties in the case of combined transportation from inserting in the document of air transportation conditions relating to other modes of transportation, provided that the provisions of this convention are observed as regards the transportation by air.

Chapter V. General and Final Provisions

Article 32

Any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void. Nevertheless for the transportation of goods arbitration clauses shall be allowed, subject to this convention, if the arbitration is to take place within one of the jurisdictions referred to in the first paragraph of article 28.

Article 33

Nothing contained in this convention shall prevent the carrier either from refusing to enter into any contract of transportation or from making regulations which do not conflict with the provisions of this convention.

Article 34

This convention shall not apply to international transportation by air performed by way of experimental trial by air navigation enterprises with the view to the establishment of regular lines of air navigation, nor shall it apply to transportation performed in extraordinary circumstances outside the normal scope of an air carrier's business.

Article 35

The expression "days" when used in this convention means current days, not working days.

Article 36

This convention is drawn up in French in a single copy which shall remain deposited in the archives of the Ministry for Foreign Affairs of Poland and of which one duly certified copy shall be sent by the Polish Government to the Government of each of the High Contracting Parties.



Article 37

(1) This convention shall be ratified. The instruments of ratification shall be deposited in the archives of the Ministry for Foreign Affairs of Poland, which shall give notice of the deposit to the Government of each of the High Contracting Parties.

(2) As soon as this convention shall have been ratified by five of the High Contracting Parties it shall come into force as between them on the ninetieth day after the deposit of the fifth ratification. Thereafter it shall come

into force between the High Contracting Parties which shall have ratified and the High Contracting Party which deposits its instrument of ratification on the ninetieth day after the deposit.

It shall be the duty of the Government of the Republic of Poland to notify the Government of each of the High Contracting Parties of the date on which this convention comes into force as well as the date of the deposit of each ratification.

Article 38

(1) This convention shall, after it has come into force, remain open for adherence by any state.

(2) The adherence shall be effected by a notification addressed to the Government of the Republic of Poland, which shall inform the Government of each of the High Contracting Parties thereof.

(3) The adherence shall take effect as from the ninetieth day after the notification made to the Government of the Republic of Poland.

Article 39

(1) Any one of the High Contracting Parties may denounce this convention by a notification addressed to the Government of the Republic of Poland, which shall at once inform the Government of each of the High Contracting Parties.

(2) Denunciation shall take effect six months after the notification of denunciation, and shall operate only as regards the party which shall have proceeded to denunciation.

Article 40

(1) Any High Contracting Party may, at the time of signature or of deposit of ratification or of adherence, declare that the acceptance which it gives to this convention does not apply to all or any of its colonies, protectorates, territories under mandate, or any other territory subject to its sovereignty or its authority, or any other territory under its suzerainty.

(2) Accordingly any High Contracting Party may subsequently adhere separately in the name of all or any of its colonies, protectorates, territories under mandate, or any other territory subject to its sovereignty or to its authority or any other territory under its suzerainty which have been thus excluded by its original declaration.

(3) Any High Contracting Party may denounce this convention, in accordance with its provisions, separately or for all or any of its colonies, protectorates, territories under mandate, or any other territory subject to its sovereignty or to its authority, or any other territory under its suzerainty.

Article 41

Any High Contracting Party shall be entitled not earlier than two years after the coming into force of this convention to call for the assembling of a new international conference in order to consider any improvements which may be made in this convention. To this end it will communicate with the Government of the French Republic which will take the necessary measures to make preparations for such conference.

This convention, done at Warsaw on October 12, 1929, shall remain open for signature until January 31, 1930.

APPENDIX F

Art. 2226. [2178-9] Attorney's fees

Any person, corporation, partnership, or other legal entity having a valid claim against a person or corporation for services rendered, labor done, material furnished, overcharges on freight or express, lost or damaged freight or express, or stock killed or injured, or suits founded upon a sworn account or accounts, or suits founded on oral or written contracts, may present the same to such persons or corporation or to any duly authorized agent thereof; and if, at the expiration of 30 days thereafter, payment for the just amount owing has not been tendered, the claimant may, if represented by an attorney, also recover, in addition to his claim and costs, a reasonable amount as attorney's fees. The usual and customary fees in such cases shall be presumed to be reasonable, but such presumption may be rebutted by competent evidence. In a proceeding before the court, or in a jury case where the issue of amount of attorney's fees is submitted to the court for determination by agreement, the court may in its discretion take judicial knowledge of the usual and customary fees in such matters and of the contents of the case file without receiving further evidence. The provisions hereof shall not apply to contracts of insurers issued by insurers subject to the provisions of the Unfair Claim Settlement Practices Act (Article 21.21-2, Insurance Code), nor shall it apply to contracts of any insurer subject to the provisions of Article 3.62, Insurance Code, or to Chapter 387, Acts of the 55th Legislature, Regular Session, 1957, as amended (Article 3.62-1, Vernon's Texas Insurance Code), or to Article 21.21, Insurance Code, as amended, or to Chapter 9, Insurance Code, as amended, and each such article or chapter shall be and remain in full force and effect. This Act shall be liberally construed to promote its underlying purposes.

Office-Supreme Court, U.S.
FILED
DEC 31 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-807

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BOEHRINGER-MANNHEIM DIAGNOSTICS, INC.,
f/k/a HYCEL, INC.,

Appellant,

v.

PAN AMERICAN WORLD AIRWAYS, INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION TO AFFIRM

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TABLE OF CONTENTS

PAGE

Table of Authorities i

Statement of the Case 1

Argument 3

Conclusion 7

TABLE OF AUTHORITIES

Cases: PAGE

Alyeska Pipeline Service Co. v. *Wilderness Society*, 421 U.S. 240 (1975) 2, 3

Benjamins v. *British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979) 4

Block v. *Compagnie Nationale Air France*, 386 F.2d 323 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968) 3

Dalton v. *Delta Airlines, Inc.*, 570 F.2d 1244 (5th Cir. 1978) 3

Finkelstein v. *Trans World Airlines, Inc.*, 15 Av. Cas. (CCH) 17,379 (N.Y. Sup. Ct. 1978) 5

Garcia v. *Pan American Airways, Inc.*, 269 A.D. 287, 55 N.Y.S.2d 317 (App. Div. 1945), *aff'd*, 295 N.Y. 852, 67 N.E.2d 257, *cert. denied*, 329 U.S. 741 (1946).... 5

Hines v. *Davidowitz*, 312 U.S. 52 (1941) 6

In Re Mexico City Air Crash of October 31, 1979, 708 F.2d 400 (9th Cir. 1983) 4

Lautore v. *United Airlines, Inc.*, 16 Av. Cas. (CCH) 17,944 (S.D.N.Y. 1981), *aff'd mem.*, 688 F.2d 816 (2d Cir. 1982) 5

Moragne v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970) 7

Nationwide Horse Carriers, Inc. v. *Johnston*, 519 S.W. 2d 163 (Tex. Civ. App. 1974) 7

Railway Co. v. *Reid*, 222 U.S. 424 (1912) 6

Reed v. *Wiser*, 555 F.2d 1079 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977) 3, 5

Sea-Land Services, Inc. v. *Gaudet*, 414 U.S. 573 (1974) 7

Seth v. *British Overseas Airways, Corp.*, 329 F.2d 302 (1st Cir.), *cert. denied*, 379 U.S. 858 (1964) 4

PAGE

Trans World Airlines, Inc. v. *Franklin Mint Corp.*, 464 U.S. ——, 104 S. Ct. 1776 (1984) 3, 4

Upton v. *Iran National Airlines Corp.*, 450 F. Supp. 176 (S.D.N.Y. 1978), *aff'd mem.*, 603 F.2d 215 (2d Cir. 1979) 5

Statutes:

Convention for the Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. §1502 note (1976) ..... *passim*

TEX. REV. CIV. STAT. ANN. art. 2226 2

49 U.S.C. §1301(3) 2

49 U.S.C. §1301(4) 2

Other Authorities:

SECOND INTERNATIONAL CONFERENCE ON PRIVATE AERONAUTICAL LAW MINUTES, Warsaw, 1929 (R.C. Horner & D. Legrez trans. 1975) 4-5

II CONFERENCE INTERNATIONALE DE DROIT PRIVE AERIEN, 4-12 OCTOBRE 1929, VARSOVIE, ICAO Doc. No. 7838 (1957) 5

No. 84-807

IN THE

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OCTOBER TERM, 1984

BOEHRINGER-MANNHEIM DIAGNOSTICS, INC.,
f/k/a HYCEL, INC.,

Appellant,

v.

PAN AMERICAN WORLD AIRWAYS, INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION TO AFFIRM

Appellee PAN AMERICAN WORLD AIRWAYS, INC.[1] (hereinafter PAN AMERICAN), pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves that the judgment of the Court of Appeals be affirmed on the ground that the question presented is so unsubstantial as not to warrant further argument.

Statement of the Case

This is an appeal from the judgment entered by the United States Court of Appeals for the Fifth Circuit on July 18, 1984 which reversed an award of attorney's fees

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[1] Pursuant to Rule 28.1 of the Supreme Court Rules, Appellee states that Pan American Corporation is its parent company.

to appellant BOEHRINGER-MANNHEIM DIAGNOSTICS, INC. f/k/a HYCEL, INC. (hereinafter HYCEL) pursuant to TEX. REV. CIV. STAT. ANN. art. 2226 on the ground that a treaty of the United States, the Convention for the Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. §1502 note (1976) (hereinafter Warsaw Convention), preempted application of the Texas statute.

Appellant Hycel obtained a final judgment against Pan American in the United States District Court for the Southern District of Texas for damages sustained to cargo transported by Pan American from Brazil to Texas via New York. The transportation was performed pursuant to a contract of transportation (air waybill) which provided for "international transportation" as defined by Article 1 of the Warsaw Convention and which constituted both interstate air commerce and foreign air commerce of the United States. 49 U.S.C. §1301 (3, 4) (1976). Jurisdiction in the district court was founded upon diversity of citizenship and upon general federal question jurisdiction because appellant's claim arose under the Warsaw Convention.

The district court found Pan American liable under Article 18 of the Convention and for common law negligence. With respect to certain types of claims, including one for damage to freight, TEX. REV. CIV. STAT. ANN. art. 2226 provides for recovery of attorney's fees incurred in prosecuting an action if demand for payment of the claim is made and it is not adjusted within 30 days thereafter. The district court awarded attorney's fees to appellant pursuant to art. 2226 in view of the finding of negligence liability under Texas common law and of the existence of diversity jurisdiction, relying upon *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 259 n.31 (1975).

The court of appeals reversed and held that the Warsaw Convention preempts the field in cases where it applies prohibiting reliance on the Texas statute for an award

of attorney's fees. The court of appeals also held no factual basis existed to warrant an award of attorney's fees under the "American Rule". *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 247 (1975).

ARGUMENT

One of the fundamental purposes of the Warsaw Convention is the establishment of "a uniform body of worldwide liability rules to govern international aviation, which would supersede with respect to international flights the scores of differing domestic laws, leaving the latter applicable only to the internal flights of each of the countries involved." *Reed* v. *Wiser*, 555 F.2d 1079, 1090 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977) (footnote omitted). *Accord Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, 464 U.S. ——, 104 S. Ct. 1776 (1984) ("The Convention creates internationally uniform rules governing the air carriage of passengers, baggage and cargo"); *Dalton* v. *Delta Airlines, Inc.*, 570 F.2d 1244, 1245-46 (5th Cir. 1978); *Block* v. *Compagnie Nationale Air France*, 386 F.2d 323, 337-38 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968). The fact that the Warsaw Convention is in force in over 100 countries is a strong testimonial to the scope of uniformity it has achieved in the area of "international transportation" of passengers, baggage and cargo by air.

The Warsaw Convention does not seek uniformity only in the international context, however. Express language in the Warsaw Convention mandates that it be applied and interpreted uniformly within any particular nation that is a party to the Convention.

> In the cases covered by articles 18 and 19 [cargo, baggage and delay] any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.

Warsaw Convention, Article 24(1), 49 Stat. 3020.

In order to achieve uniformity of the law within a nation party to the Warsaw Convention, the Convention creates a cause of action in favor of a consignor or consignee against an air carrier for damage to, destruction or loss of goods carried in "international transportation" as defined by Article 1 of the Convention. Article 18 of the Convention provides the standard for liability and Article 30(3) of the Convention specifies who may bring suit and against whom suit may be brought. Warsaw Convention Articles 18, 30(3), 49 Stat. 3019, 3021; *Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, 464 U.S. ——, 104 S. Ct. 1776 (1984); *Seth* v. *British Overseas Airways Corp.*, 329 F.2d 302 (1st Cir.), *cert. denied*, 379 U.S. 858 (1964) (Articles 18 and 30 create cause of action for loss of luggage). *See In Re Mexico City Air Crash of October 31, 1979*, 708 F.2d 400 (9th Cir. 1983) (Article 17 creates cause of action for wrongful death); *Benjamins* v. *British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979) (Article 17 creates cause of action for wrongful death).

The drafting history of the Warsaw Convention demonstrates that the drafters intended the cause of action it created to be the exclusive remedy available in cases to which the Convention applies. The exclusive aspect of the Convention, embodied in Article 24, was emphasized at the drafting table by Sir Alfred Dennis of Great Britain:

> We have at the beginning of the article: ". . . any liability action however founded can only be brought under the conditions and limits provided for by the present Convention."
>
> It's a very important stipulation which touches the very substance of the Convention, because this excludes recourse to common law. . . .

SECOND INTERNATIONAL CONFERENCE ON PRIVATE AERONAUTICAL LAW MINUTES, WARSAW, 1929 213 (R.C. Horner & D.

Legrez trans. 1975) 213, *translating* II CONFERENCE INTERNATIONALE DE DROIT PRIVE AERIEN, 4-12 OCTOBRE 1929, VARSOVIE 140, ICAO Doc. No. 7838 (1957). In addition to the holding of the Fifth Circuit in this cargo case, other courts have found that the Warsaw Convention exclusively[2] governs claims for injuries sustained during international air transportation as defined in the Convention. *See Reed* v. *Wiser*, 555 F.2d 1079, 1090 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977); *Lautore* v. *United Airlines, Inc.*, 16 Av. Cas. (CCH) 17,944 (S.D.N.Y. 1981), *aff'd mem.*, 688 F.2d 816 (2d Cir. 1982); *Upton* v. *Iran National Airlines Corp.*, 450 F. Supp. 176, 178 (S.D.N.Y. 1978), *aff'd mem.*, 603 F.2d 215 (2d Cir. 1979).

To permit appellant in the case at bar to proceed on its non-Convention negligence cause of action would contravene both the express provisions of the Convention and the unmistakable intent of its drafters. *See Garcia* v. *Pan American Airways, Inc.*, 269 A.D. 287, 55 N.Y.S.2d 317 (App. Div. 1945), *aff'd*, 295 N.Y. 852, 67 N.E.2d 257, *cert. denied*, 329 U.S. 741 (1946); *Finkelstein* v. *Trans World Airlines, Inc.*, 15 Av. Cas. (CCH) 17,379 (N.Y. Sup. Ct. 1978). It would be anomalous, indeed, if on an international level the Warsaw Convention were interpreted uniformly while on the national level within the United States a cause of action created by the Convention were subjected to varying laws of the individual states. Uniform treatment within the United States of claims arising under the Warsaw Convention is clearly required to avoid any such anomalous result. The Warsaw Convention's objective of uniformity would be severely frustrated if the extent of liability of an air carrier under the Warsaw Convention for cargo damage depended upon the particular state

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[2] Where the signatories to the Convention intended that domestic law of a nation party to the Convention applies to a particular matter, the rules of the Convention expressly so state: Article 21 (contributory negligence), Article 24(2) (standing of and allocation among survivors), Article 25 (fault equivalent to wilful misconduct or *dol*), Article 28 (procedure) and Article 29 (running of the statute of limitations). 49 Stat. 3019-21.

within which an action is brought. The doctrine of preemption, therefore, was necessarily applied by the court of appeals to prevent frustration of the Convention's specified objective. *Cf. Hines* v. *Davidowitz,* 312 U.S. 52, 67 (1941).

Pan American could have been sued anywhere in the United States where it is subject to personal jurisdiction but, perhaps, only in Texas would it be liable on a cargo claim for attorney's fees. The Texas statute imposing that liability does not even require that there be any nexus between Texas and the damage sustained. In this case, the damage could have occurred outside Texas or, even, the United States. Yet, under appellant's reasoning Pan American is liable for attorney's fees because it was sued in Texas and did not comply with the claim settling procedures set forth in a Texas statute.

It is Article 26 of the Covention, however, that specifies the only procedures that are required with respect to a cargo claim, timely notice in the proper manner by the consignor or consignee to the carrier of the claimed damage. Warsaw Convention, Article 26, 49 Stat. 3020. If requirements with respect to either the presentation or adjustment of claims are to be imposed in addition to those of Article 26, any such requirements should be implemented on a national level rather than on a state-by-state basis. Varying state law claims procedures should not be superimposed on the requirements of the Warsaw Convention. On a claim involving the interstate and international transportation of cargo, Pan American, which conducts operations and has offices throughout the United States and the world, should not be required to alter its claims handling procedures to comply with the Texas statute. *See Railway Co.* v. *Reid,* 222 U.S. 424, 436 (1912).

Inasmuch as appellant's cause of action arises under a treaty of the United States that has as one of its prime objectives uniformity in the law governing "international

transportation", the Warsaw Convention should be interpreted and applied uniformly within the United States so that the extent of liability of the carrier will not be dependent upon the law of the state in which the action is brought but, rather, subject to a uniform Federal standard. *See Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573 (1974); *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970).

Moreover, the allegation and finding of negligence under Texas law do not remove the claim from the ambit of the Warsaw Convention as a Federal law requiring that claims arising under it be treated and interpreted uniformly within the United States. *See Nationwide Horse Carriers, Inc.* v. *Johnston*, 519 S.W.2d 163, 169-70 (Tex. Civ. App. 1974).

> Johnston . . . contends that his claim is asserted as a common law suit for damages and is not based upon a bill of lading contract with the interstate carrier. We are of the opinion that Johnston's claim must be considered "as involving a claim for damages to freight arising under federal law" and that the circumstances of the interstate shipment and the uniformity of treatment of freight damage claims are the controlling factors in the case.

Id. Here the claim arose out of a relation created by a contract of carriage, an air waybill, for "international transportation" and, therefore, those same factors are controlling here.

CONCLUSION

To permit application of the Texas statute authorizing an award of attorney's fees if certain state-imposed claims procedures are not followed would undermine the uniformity achieved by the Warsaw Convention on the international level and the uniformity mandated by the Convention on the national level. The judgment of the court

of appeals that the Texas statute is preempted was correct in all respects and this Motion to Affirm should be granted.

Respectfully submitted,

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Of Counsel:

CONDON & FORSYTH

Dated: December 18, 1984

Certificate of Service

I hereby certify that I have, this 18th day of December, 1984 served the foregoing Motion to Affirm upon appellant by depositing same in a United States mail box at 1251 Avenue of the Americas, New York, New York 10020 with first class postage prepaid, addressed to Alden D. Holford, counsel of record for appellant, at his post office address, 7322 Southwest Freeway, Suite 670, Houston, Texas 77074.

December 18, 1984

/s/ LAWRENCE MENTZ

Lawrence Mentz
Counsel for Appellee